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IN THE SUPREME COURT OF THE UNITED STATES

LARRY DEAN DUSENBERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, with respect to an administrative forfeiture completed before the effective date of the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (April 25, 2000), the court of appeals erred in holding that the government provided sufficient notice to petitioner.

2. Whether the district court erred in declining to exercise equitable powers to compensate petitioner for the 1986 seizure by the government of an automobile and other items of personal property, where the evidence established that all of that property was acquired by petitioner with proceeds from unlawful drug sales.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5) is reported at 223 F.3d 422. The order of the district court (Pet. App. 4) is reported at 34 F. Supp. 2d 602. A prior opinion of the court of appeals (Pet. App. 1) is not reported, but the judgment is noted at 97 F.3d 1451 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2000. Pet. App. 5. A petition for rehearing was denied on

August 25, 2000. Pet. App. 6. The petition for a writ of certiorari was filed on October 16, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After petitioner's conviction on drug charges, the government obtained administrative forfeiture of cash and an automobile, and disposed of other personal property seized from petitioner at the time of his arrest. The district court denied petitioner's subsequent motion for return of the seized property (Pet. App. 4), and the court of appeals affirmed (Pet. App. 5).

1. On April 29, 1986, petitioner was arrested on drug and firearm charges. Pet. App. 4, at 2. He pleaded guilty to a drug charge and was sentenced on July 26, 1986. Ibid. During a search of petitioner's property at the time of his arrest, law enforcement agents seized approximately $21,940 in cash, a 1984 Chevrolet Monte Carlo automobile, and miscellaneous personal property. Ibid. The cash and the automobile were administratively forfeited as the proceeds of drug sales, pursuant to 21 U.S.C. 881(a)(6), when petitioner did not file a bond as required by the forfeiture regulations applicable at that time. Ibid. The other seized personal property was abandoned or destroyed as evidence following petitioner's conviction. Ibid.

2. In 1993, seven years after the seizure, petitioner filed a motion requesting return of the seized property pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, alleging that the government had forfeited the property without giving him adequate notice of the forfeiture.[1] Pet. App. 1, at 1-2; Pet. App. 4, at 3. The district court denied that motion for lack of jurisdiction, but the court of appeals vacated that order and remanded for further proceedings. Pet. App. 1, at 1. The court of appeals explained that, although petitioner could not pursue his claim under Rule 41(e) because the criminal proceedings had been completed, the district court should have permitted petitioner's action to continue by construing petitioner's Rule 41(e) motion "as a civil complaint seeking equitable relief." Id. at 2.

3. On remand, the district court heard evidence and granted the government's motion for summary judgment. Pet. App. 4. With respect to the cash, the district court found that the government provided sufficient notice of the forfeiture proceeding when it sent notice, by certified mail, of the

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[1] Rule 41(e) provides in part: "A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court * * * for the return of the property on the ground that such person is entitled to lawful possession of the property."

proceeding to petitioner at the Federal Correctional Institution in Milan, Michigan (the "Milan FCI"), where petitioner was incarcerated at the time. Pet. App. 4, at 6-8. In reaching its conclusion that notice was sufficient, the district court relied, in part, on an affidavit from James Lawson, an Inmate Systems Officer at the Milan FCI. Lawson attested that he signed the certified mail receipt for the forfeiture notice, and he described the process in effect at that time for forwarding certified mail to inmates.[2] Id. at 6, 7 & n.6. With respect to the automobile and the other personal property seized from petitioner at the time of his arrest, the district court found that the evidence in the present case, including petitioner's admissions, demonstrated that all of those items were purchased with proceeds from unlawful drug sales. The court therefore declined to exercise its equitable powers to compensate petitioner. Id. at 8-13.

4. The court of appeals affirmed. Pet. App. 5. The court of appeals agreed with the district court that the

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[2] Under the system in place at the time the notice was received at the Milan FCI in 1986, all certified mail was entered into a log book before the mail left the mail room, and a staff member assigned to the inmate signed for the inmate's mail and delivered it to the inmate. Pet. App. 4, at 7 n.6. At the time of Lawson's testimony in 1997, the 1986 log book no longer existed. Ibid.

administrative forfeiture of the approximately $21,940 in cash was proper. Pet. App. 5, at 4. The court observed that the government had provided "persuasive evidence" that the forfeiture notice was delivered by certified mail to the facility where petitioner was incarcerated, and it noted the evidence of the process for forwarding that mail to the inmates. Ibid. The court of appeals thus concluded that the forfeiture notice to petitioner was sufficient and "reasonably calculated, under all the circumstances, to apprise [petitioner] of the pendency of the action and afford [him] an opportunity to present [his] objections." Ibid. (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). The court further ruled that due process did not require the government to prove that the mail actually reached petitioner. Pet. App. 5, at 4.

The court of appeals also upheld the district court's order declining to grant petitioner compensation for the seized automobile and the other personal property that petitioner had acquired with drug proceeds. Pet. App. 5, at 5. The court of appeals held that "one never acquires a property right to [drug] proceeds," and it therefore declined to allow petitioner "to

retain the fruits of illegal activities, his involvement in which is undisputed."[3] Ibid.

ARGUMENT

1. Petitioner contends (Pet. 12-18) that he was not provided with adequate notice before the administrative forfeiture of the $21,940 in currency seized at the time of his 1986 arrest. As petitioner explains (Pet. 16-17), the courts of appeals are divided on whether the government must show that an incarcerated claimant received actual notice of a forfeiture proceeding. The court below correctly decided that the forfeiture notice sent by certified mail to petitioner at the facility where he was incarcerated was sufficient to comply with the requirements of due process. Further review is not warranted, particularly in light of the recent enactment of the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185,

[3] During the time that petitioner was imprisoned following his 1986 conviction, he continued to manage his cocaine distribution network. That conduct resulted in a separate conviction in 1994 for engaging in a Continuing Criminal Enterprise, in violation of 21 U.S.C. 848, and in the forfeiture of additional property. See United States v. Dusenbery, 1996 WL 306517 (6th Cir.) (affirming CCE conviction), cert. denied, 519 U.S. 956 (1996). The Sixth Circuit subsequently rejected petitioner's challenge to the validity of the forfeitures associated with that 1994 conviction, and this Court recently denied review. United States v. Dusenbery, 201 F.3d 763 (6th Cir. 2000), cert. denied, 121 S. Ct. 301 (No. 99-9814, October 10, 2000).

114 Stat. 202 (April 25, 2000) (codified at 18 U.S.C. 983), which establishes a comprehensive structure governing motions to set aside civil forfeitures based on lack of notice.

The means used to notify petitioner of the currency forfeiture proceeding satisfied constitutional requirements. This Court has recognized that due process requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314. In this case, notice of the currency forfeiture was sent by certified mail to the penal institution where petitioner was incarcerated, and there was additional evidence that a system was in place within that institution to assure delivery of certified mail to the inmates. Pet. App. 4, at 6-8, 7 n.6. As the court of appeals explained, this notice was "reasonably calculated" to apprise petitioner of the forfeiture action and thus was constitutionally sufficient. Pet. App. 5, at 4 (quoting Mullane, 339 U.S. at 314); see also Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) (notice by mail is typically sufficient for due process purposes).[4]

[4] Petitioner renews his argument that the notice was misaddressed and may not in fact have been received at the Milan

"'Reasonably calculated' means likelihood, not certainty," and proof of actual receipt of notice by an incarcerated forfeiture claimant is not required. Whiting v. United States, 231 F.3d 70, 76 (1st Cir. 2000) (certified mail notice sent to prisoner at the proper address affords due process in a civil forfeiture case); see United States v. Minor, 228 F.3d 352, 357-358 (4th Cir. 2000) (actual notice not required, suggesting that certified mail plus evidence of delivery procedures within the prison would be sufficient); United States v. One Toshiba Color Television, 213 F.3d 147 (3d Cir. 2000) (en banc) (actual notice not required); United States v. Real Property, 135 F.3d 1312, 1315-1316 (9th Cir. 1998) (rejecting inmate claimant's argument that due process requires that he receive actual notice of the forfeiture proceedings); United States v. Clark, 84 F.3d 378, 381 (10th Cir. 1996) (concluding that the government complied with due process requirements when it sent notice by certified

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FCI. Pet. 15 (pointing out that the notice was addressed to P.O. Box 100 rather than P.O. Box 1000 in Milan). The evidence, however, showed that the address was sufficient in that the notice was in fact received at the Milan FCI where it was signed for by the appropriate prison official. Pet. App. 4, at 6-7. In any event, the factual determination by both courts below that the notice was properly directed to the prison where petitioner was incarcerated at the time does not warrant further review. See Pet. App. 4, at 6-8; id. at 9 n.9; Pet. App. 5, at 4 (noting "persuasive evidence that a prison mail room employee signed the certified mail receipt").

mail to prison where claimant was incarcerated, even if claimant may not actually have received notice).

Petitioner argues that these decisions and the decision of the court below are inconsistent with decisions in other circuits that require the government to establish actual delivery of the forfeiture notice to an incarcerated claimant. Pet. 14-18. In Weng v. United States, 137 F.3d 709 (2d Cir. 1998), the Second Circuit did hold that mailing of a forfeiture notice to an inmate's place of incarceration was not necessarily sufficient, and that "actual delivery" to the intended recipient must be shown. Id. at 715. The Eighth Circuit has adopted a similar rule.[5] United States v. Five Thousand Dollars in U.S. Currency, 184 F.3d 958 (8th Cir. 1999); United States v. Woodall, 12 F.3d 791 (8th Cir. 1993).

The Weng requirement of proof of actual notice "undermines the procedural analysis that has heretofore animated the Supreme

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[5] Contrary to petitioner's assertion, the First Circuit does not require actual notice. In United States v. Giraldo, 45 F.3d 509 (1st Cir. 1995), the notice at issue was apparently sent to an inmate's home address, not to his prison address, during the time he was incarcerated. The Giraldo court did not resolve whether the notice provided in that case was sufficient. Id. at 510-512 (remanding for consideration whether notice provided was adequate). In its more recent decision in Whiting, the First Circuit concluded that, absent special circumstances, mailing of a forfeiture notice to the prison where a claimant is being held is sufficient to comply with the requirements of due process. Whiting v. United States, 231 F.3d at 76-77.

Court's dictates" on notice requirements. One Toshiba Color Television, 213 F.3d at 155. This Court has "never employed an actual notice standard in its jurisprudence. Rather, its focus has always been on the procedures in place to effect notice." Ibid. (citing Mennonite Bd. of Missions, 462 U.S. at 799-800). Further, an actual notice requirement "could impose an undue evidentiary burden on the government, particularly in cases - such as the present case - in which the prisoner challenged the sufficiency of notice long after the completion of the forfeiture." United States v. Minor, 228 F.3d at 358. "In such cases, 'an overly strict notice requirement could lead to unsettling the outcome of completed proceedings based on nothing but bare allegations of a party who has lost his property.'" Ibid. (quoting One Toshiba Television, 213 F.3d at 155). That concern is present in this case, because petitioner did not challenge the forfeiture until seven years after the 1986 seizure of the currency, when prison logs that would have provided information regarding the delivery of the certified mail notice had been destroyed. See Pet. App. 4, at 7 n.9.

In any event, notwithstanding the differing views among the circuits on the need for proof of actual delivery, further review is not warranted in light of the enactment of the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114

Stat. 202 (April 25, 2000), codified at 18 U.S.C. 983 (Westlaw 2001), which markedly changes the context in which this type of litigation will be conducted. The new Act is applicable to forfeiture proceedings commenced on or after August 23, 2000. See Pub. L. No. 106-185, § 21, 114 Stat. 225.

Under the new Act, the procedure established in the newly enacted 18 U.S.C. 983(e) (Westlaw 2001) is the exclusive remedy for seeking to set aside a declaration of forfeiture under a civil forfeiture statue. See 18 U.S.C. 983(e)(5) (Westlaw 2001). The new statute allows a forfeiture to be set aside on grounds of lack of notice only if the government "knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice," and "the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim." 18 U.S.C. 983(e)(1) (Westlaw 2001).

Because these new statutory provisions will govern forfeiture actions commenced on or after August 23, 2000, the question posed by petitioner with respect to past forfeitures does not present an issue of continuing significance. To the contrary, it affects only a small and rapidly diminishing number of cases and further review is unwarranted.

2. Petitioner further contends (Pet. 18-20) that the district court erred in declining to order compensation for the government's failure to return to him the automobile and the miscellaneous personal property that were not lawfully forfeited.[6] After determining that the property in question was wholly purchased with drug proceeds, however, the district court properly "decline[d] to exercise its equitable powers" to compensate petitioner. Pet. App. 4, at 12-13. As the court of appeals observed, "[s]omeone who purchases property with drug proceeds 'has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity.'" Pet. App. 5, at 5 (quoting United States v. Tilley, 18 F.3d 295, 300 (5th Cir. 1994)). Moreover, as the court of appeals held, "[t]o order compensation for destruction of this property or improper notice of forfeiture would allow [petitioner] to retain the fruits of illegal activities, his involvement in which is undisputed." Pet. App. 5, at 5.

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[6] The district court found that the government did not show that it provided sufficient notice to petitioner of the administrative forfeiture proceeding relating to the automobile. Pet. App. 4, at 9 n.9. No forfeiture proceeding was initiated with respect to the miscellaneous personal property. Id. at 2.

a. Petitioner argues that the courts below did not have jurisdiction to consider whether the car was obtained with drug proceeds because the original forfeiture of the car was void and the five year statute of limitations barred any new forfeiture proceeding. Pet. 18-19 (citing Clymore v. United States, 164 F.3d 569, 572-574 (10th Cir. 1999)). The Court recently denied certiorari on a substantially similar issue raised by petitioner in his challenge to a later forfeiture of his property. See note 3 supra. In our response to that petition (No. 99-9814), we noted a split of authority on whether a forfeiture could be reinstituted after it was set aside for lack of notice when the statute of limitations for forfeiture actions had run, compare, e.g., United States v. Dusenbery, 201 F.3d 763, 767-768 (6th Cir. 2000) (proper remedy where forfeiture set aside for inadequate notice is to provide the claimant with the right to judicially contest forfeiture), with Clymore v. United States, 164 F.3d 569, 574 (10th Cir. 1999) (where forfeiture set aside for inadequate notice, running of statute of limitations generally bars initiation of forfeiture proceeding). We contended, however, that review was not warranted because the Civil Asset Forfeiture Reform Act of 2000 resolves this issue for all forfeitures commenced after August 23, 2000. The new Act establishes that when a forfeiture is set aside for

insufficient notice, a subsequent forfeiture action may then be commenced "notwithstanding the expiration of any applicable statute of limitations." 18 U.S.C. 983(e)(2)(A) (Westlaw 2001). Because this new law resolves the conflict, and because of the other reasons discussed in our response to the petition in No. 99-9814, further review of this question is also not warranted in this case.[7]

b. Petitioner also challenges (Pet. 19-20) the factual determination below that he purchased the automobile and other personal property in question with cash obtained from drug sales. See Pet. App. 4, at 10-11 (district court finding); see also Pet. App. 5, at 4. The record, however, provides ample support for this finding. See, e.g., Pet. App. 2, at 11-12 (petitioner's admission that the property was purchased with cash from drug sales); id. at 15 (petitioner's agreement at evidentiary hearing that "all these items were bought with drug money"); id. at 16 (admission that petitioner had not been lawfully employed since 1983); id. at 22 (admission that automobile was purchased in 1985 with cash that was "probably"

[7] To the extent that petitioner's claim is based on the failure to return miscellaneous personal property that was abandoned and destroyed as evidence rather than subjected to forfeiture proceedings, petitioner cites no cases that conflict with the decision below.

proceeds from cocaine sales). In any event, the factual determination by the district court does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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